Making Modern Treaties Work – LCAC
Breakout 2E: Legal and Policy Updates

Moderator: Daniel T'seleie, Self-Government Negotiator, K'asho Got'ine

PANELIST 1: Paul Bachand, Partner, Pape Salter Teillet LLP

- This is going to be a legal and policy update on the Mackenzie Valley Resource Management Act and Bill C-88.
- There is a story that has implication for treaty implementation. First, some background on the Tłįchǫ Agreement.
    - There is a treaty right to co-management.
    - We already heard during the conference about the situation where the Harper Government ended up trying to impose a number of changes to the MVRMA to impose a superboard.
- Treaty rights to co-management are set out in Tłįchǫ Agreement and other modern treaties in the NWT, including the Gwich'in and Sahtu land claims. This helps reconcile the overlapping interests of federal/territorial and Indigenous governments. Modern treaty sets up the board.
- Treaty right to co-management established 4 regionals boards:
    - Wek'èezhìi Land and Water Board
    - Sahtu Land and Water Board
    - Gwich'in Land and Water Board
    - the Mackenzie Valley Land and Water (where there is no modern treaty signed or transboundary project is being considered).
- Wek'èezhìi Land and Water Board has been working since Tłįchǫ Agreement signed. The board was established on the effective date, to act in the public interest, manage land and water. The Board has jurisdiction over land (including subsurface resources), water, and deposits of waste within its management area and administers permitting and licensing systems. The objective of the land and water board is to regulate the land and water,
- The Tłįchǫ Government appoints 50% of the members.
- Harper government made proposals that would change the NWT Land and Water Board by amalgamating the boards into one "Superboard". The proposal was passed into law, but never ended up going into force.
- On the "Superboard" Tłįchǫ appointees would only represent 33% .
- The view was that this change was inconsistent and that there was really no good reason for the change. Not only that, but the changes were contrary to the Agreement.
- Harper Government passed the *Northwest Territories Devolution Act*, despite objections from the Tłįchǫ, Sahtu and Gwich'in.
    - The Tłįchǫ representation would drop from 2 out of 4 members of the board to 1 out of 10.
    - Further, decisions were going to be made by "ad hoc committees". These committees would have only 3 members. If the application was in Wek'eezhii, then the chairperson would designate a Tłįchǫ person on the committee ONLY if

it was reasonable to do so. So there was no guarantee a Tłı̨chǫ person would even be involved in the decision.

- So Tłı̨chǫ launched an injunction, which made it to Supreme Court of the NWT. The motion was successful and the court decision suspended the operation of the Devolution Act which would have allowed the executive branch to bring the MVRMA amendments into effect.
    - When Tłı̨chǫ went to the NWT Supreme Court, there was a serious constitutional issue which would flow from violation of constitutional rights.
- There was then a change in government. Trudeau ended up consulting with IGs after 2015.
- C-88 was part of the follow through of that process, which repealed the Superboard. In terms of dealing with Superboard, we did not want to to "throw out the baby with bathwater". Bill C-88 also reintroduced other regulatory provisions that were suspended as part of the injunction but had broad support from both industry and Indigenous governments.
- But, Bill C-88 also contained a "poison pill".
    - Bill C-88 also amended the Canada Petroleum Act.
    - Context: In 2016, Canada unilaterally imposed a moratorium on off-shore and gas licences in Arctic. This was a surprise to Territorial and Indigenous governments.
    - The amendments codified the federal cabinet's ability to make orders prohibiting offshore oil and gas activities in the Arctic. Bill C-88 received royal assent, before the last election. They then rushed to get it past. In the end it had full support and went through House of Commons and Senate.
- Lessons learned
    - Really important to stay involved in treaty implementation. Jurisdiction is like a muscle, you need to work it or it will atrophy.
    - Same with position on boards. Need to have board positions filled so that you can defend that you take the implementation seriously.
    - Be vigilant. Always be aware of what is happening and makes sure to say when you disagree.
- That is where we are, some excellent changes are now in place.

PANELIST 2: Erin Thomson-Leach, JFK Law Corporation

- Recognition and Reconciliation of Rights (RRP) was talked about during the lunch speech lunch with optimism and enthusiasm.
- I currently work with 7 FNs that are negotiating modern treaties, negotiating at 2 different tables and have they had each signed AIP, working in stage 5.
- Context:
    - This policy was released a few months ago in Sept 2019, so we are still waiting to what is going to happen and what it looks like on the ground. The policy is meant to be a guide in the BC process, but it is relevant for all modern treaty holders throughout the country. This reflects the changes we are seeing in the government approach which is setting some good precedents.

  - They are also thinking about amending treaties.
  - Interesting right now to see some of the content of the policy because in BC we are seeing a lot of reconciliation tables forming that are not comprehensive. These tables are producing some incremental measures and tangible benefits. Seeing how the policy can bring the incremental measures forward.
  - All of this is happening with the context of UNDRIP. Looking forward to seeing the impact of this on the negotiation and implementation of the treaties.
- Principles and highlights:
  - Crown recognizes rights, not extinguish or modify. This is going to evolve; it has to be flexible and adaptable. Extinguishment in the language of colonialism.
  - Treaties will not require full and final settlement anymore.
  - Parties are aiming to implement UNDRIP, which can be seen if you go through the policy. There is language drawn from UNDRIP for management, self-determination, co-governance. This is quite heartening.
    - Includes right to redress and FPIC.
  - BC entered into incremental agreement, $147 Million over 5 years for a number of initiatives, socio, cultural, language, etc., while the parties negotiate more comprehensive agreement.
    - Having an agreement that provides comprehensive funding would be a huge benefit.
    - Policy also emphasizes it is important to be warry of one size fits all
  - This will better reflect the inherent right to self determination. Can't be talking about reconciliation when every time you bring something new to the table there is pushback due to the system.
  - Shared decision making is another opportunity: inherent economic component of the values.
- Implementation
  - Not implementing treaty, but rather discussing bringing this policy to life.
  - First piece is co-developing mandates, noticed this has been happening in the past few months.
    - E.g. feds coming to the table to talk about fish, saying we don't have a mandate, but let's talk about what you want to talk about.
    - Optimistic about this approach.
    - We can work together at the table, developed great relationships.
    - Then the cabinet black box, when mandate is not accepted, why and how is that going to go to community?
  - Progress through incremental measures, early land transfer, money for capacity building.
  - Would like to work with Canada, how do we build technical capacity to do it and not just rely on outside experts the entire time?
  - Need to creating the space for shared decision making. Moving past just an advisory board, not fettering the discretion of the Ministers.

- We need to do things differently if we are going to make space for self-government and self-determination.

- This is not limited to those negotiating in BC. The idea of rights recognition is broader, it is something that the crown is going to adopt through the negotiations.
- I spend time osculating between inspiration and frustration. Today have been hearing about hope and optimism. Have some questions about how this policy is going to play out. Great opportunity and a good reason for hope and optimism.

PANELIST 3: Dillon Johnson, Advisor, Tla'amin Nation

- Tla'amin. Modern Treaty should be seen as a marriage and not a divorce, these are living agreements.
- If there are new approaches, those new tools should be available to modern treaty nations. Existing modern treaty nations must have the option to update their agreements if they so choose in order to take advantage of such new approaches.
- Pooled borrowing
  - Access to capital, is a challenge that Indigenous communities face.
  - How do other governments finance the development? When they are large enough, they have direct access to capital markets and issue bonds. Smaller government use pool borrowing.
- One benefit of pooling request is the fixed interest rate for much larger period of time (25 years).
- Currently there is space within the legislation for this.
- If there are treaty holders are self-governing that want to have access to pooled borrowing under FFA. Work is underway between Canada/BC and fiscal institutions under FFA. Modern treaty nations in BC are involved in the drafting of that regulation. If you want more information on this reach out to Dillon Johnson.
- Fiscal Management Act (FMA) has been in place since 2005 and is driven by FN's - a coalition of the willing. Provides access to capital and ability to access financing.
  - It is optional, can opt in.
  - Can use the tools once they are written in the Act.
  - 288 FNs scheduled to the Act.
  - Support economic development with a big focus on capacity development.
  - Provide tools, sample laws, for FNs to use if they wish for governance.
  - Provides FN access through finance authority. Allows FN to leverage government similar to other levels.
- Diagram of the FMA Borrowing Regime
  - A lot of FNs borrowing under this Act are getting funds from provincial/territorial government.
  - The FN then seeks to get certified by the FNMB.
  - FMB establishes standards, if an FN can meet the standards they can be certified. Almost like a credit score for borrowing.
  - FN Tax Commission, only if collecting property taxes. Oversee the exercise of tax jurisdiction.

- 288 Nations scheduled to the Act, 60 that have received loans from FNFA, issues bonds of $715million in total. That is money FNs are investing in their own community for priorities.
- A number of considerations
  - Borrowing pool on credit rating. Part of the program, something modern treaty and self-governing Nations will need to weigh.
    - Will be asked to meet a certain standard.
    - Establishing the standards, the communities might want to get involved in what the standards look like.
  - Paramountcy: has been a problem so far, some areas where FN has supreme law-making authority. Lawyers for Canada get nervous about the ability to do that because they are concerned that Nation that takes a loan will be able to legislate their way out of it.
  - Intervention: a real big one. If a FN takes a loan and defaults on it there are some safe guards. Intervention is one of the later steps, FNMB would take revenue from the community and send it back to loan repayment. Some self-governing communities might not take well to this.
  - P/T arrangements: working through with BC right now. Difference across agreements.
  - Joint and Several Liability: gives investors comfort. If one FN default on a pool of ten, the other 9 FNs need to kick in to preserve the integrity of the borrowing pool.
  - Funding for INF v. INF Needs: worried about joining, because this is Canada's responsibility. Canada should pay for INF, Canada has not shown ability or interest to fund CLH INF or recreation INF. Are we going to wait for Canada to change their policies and funding approaches?
    - Canada will never have enough money to pay for all INF needs, so how long do we wait? Might take an opportunity to use this pooled borrowing to make INF that we need.

PANELIST 4: Stephen Gagnon, Director General, Canadian Heritage

- Work for Canadian Heritage, Indigenous Language Act
- We walk through legislative process, provision of the Act might be interesting, talk about statutory obligations that the act contains.
- Act was tabled in the new house of parliament in 2019. Expected some element of fanfare with the tabling, but that wasn't the case. Although people from FNs were happy about tabling it and Minister tried to make a speech, the Speaker ruled him out of order. This was interesting.
- There was an intense legislative process including a number of appearances made in the House of Commons and Senate. There were a number of amendments, and some accepted and incorporated.
- I would encourage you all to read the act, as it is not too long.

- It is a framework for both supporting language revitalization and the creation of the office of the commissioner of Indigenous language (TRC Call to Action 15)
- Most of the Act deals with financial and special examination provisions. We had to build in safeguards so people could review expenditures.
- More interesting to the group here, would be the pre-amble (fairly long) and among the things that it says is that Canada is committed to implementing UNDRIP, Canada recognizes rights and self-government, and is committed to adequate, sustainable and long-term funding for Indigenous languages. This is a welcome development. There is also a non-derogation clause. Upholding the rights of Indigenous people from Section 35.
    - Any conflict between this and a treaty, the modern treaty prevails. That was always the case as modern treaties trump, but it is important to acknowledge in the wording.
- Purpose is to revitalize and maintain Indigenous languages.
- Another purpose is to ensure adequate, sustainable and long-term funding for Indigenous governments. This is the first time Federal legislation has made this kind of commitment.
- House Committee: facilitate meaning opportunities for policy development in relationship to this act. Sometimes the view is that Canada got support for initiative and then walked away about the input from how it should be implemented.
- A recognition that the rights of Indigenous peoples include right of Indigenous language is a widely held view, but it is still important to acknowledge it.
- Couple pieces on consultation: wide variety of IGs and other bodies including organizations. We think this is a first. Strong commitment on pretty intense discussions on how to meet the objective. There are elements in the system that are a little uncomfortable.
- Adequate is in the eye of the beholder, so we are going to have to make that work.
- Modern treaty– In Section 10 of the Act, we are trying to convey there is that we recognize that Modern Treaty and Self-Governing groups might already have provisions for this piece.
    - But we heard the concern that once you are Self-Government or Modern Land Claim, then you are denied benefits and funding sources.
    - So we are saying this Act exists and is available, but recognizes that you already have an arrangement with Canada and you can work the language goals through that if you'd like.
    - Open to comments you might have on that.
- Consult widely on the appointment of the commissioner and the way it is done and the directors.
- Part of the Act came into affect August 29, 2019. Parts mainly relating to the operation of the office of the commission
    - Essence was little point to have commission without someone who could hear the complaints.

Questions:

1. For Paul, the super board concept was never tested in court. Has been legislated out of existence?
   Paul Bachand
   - Yes. It was never tested in court as there was no requirement to do that.
   - There was a lot of evidence that the regional boards had some of the best turn around time in Canada for making decisions.

2. Question around the language of the Supreme Court injunction. Was the concern around the loss of authority or disproportionally of Tlicho citizens, the % of citizens? How did they categorize the interests?
   Paul Bachand
   - It was about the loss of authority in appointing.
   - Centrality of Section 25 of the Tłı̨chǫ Agreement. 50% appointment representation and more than that was to operate in the Wek'eezhii region. The Tłı̨chǫ were guaranteed to have a voice on decisions being made.
   - When the Superboard was imposed, that went from 50% to 10% and there was also the possibility that there would be no Tłı̨chǫ voice on the ad hoc committee. This was a violation of not only the intent, but the actual wording of the Agreement.

3. Negotiators are comforted by the idea of a Constitutional Agreement. But one party changed the Agreement. How in good faith did one party unilaterally change the Agreement? After the non-implementation of the number treaties, this world we are in, some of what the government is doing beyond recognition. Section 35 is out the window, could future governments can follow what the Harper government did?
   Paul Bachand
   - Good news is that, in the end, while there was a lot of planning in place to make the outcome happen, it never happened in the end.
   - Took some vigilance, injunction and a change of government.
   - There is a provision in Tłı̨chǫ about amalgamation of boards, but not the context for this to happen. The way in which the government of the day tried to impose it was a problem. The government of the day perceived a problem, and the Superboard was the solution and nothing would change.
   - They weren't listening to the consultation.

4. Before Nunavut came to existence, Inuit were on boards, not just public government. Prior to 1993, before Section 35, before self-government, Inuit were very effective in the boards. Then when the government of Nunavut was created, they thought that with 85% of the population being represented, they wouldn't need the boards and they were abolished. It is unfortunate. When the GN became a Superboard, education started declining and health indicators declined. Inuit could not make the decision, that is the effect. Attendance from high school went from 90% to 60%, so there is a significant decline in our education attainment and health indicators. Tried to advocate for language

in daycare, schools, etc. Heritage funding was for French Canada and English Canada, but there is not enough funding for Indigenous languages. It is hard to revitalize Inuktitut when competing with other Indigenous groups. English and French are not in threat, Indigenous languages are. They will become extinct. Want to know what the Commissioner's role will be, when my 10 year old can't speak Inuktitut?

Stephen Gagnon

- We are in the very early stages of implanting the Act, so we know we have some work to do.
- LCAC was formed because they were optimistic about signing, only to feel that Canada walked away. This is not enough until Canada implements. Can say that the funding for Indigenous languages was $8 million across the country, that is true.
- But in Budget 2019, we added $333 million over 5 years and $115 million to help. People still don't think that meets adequacy and we need to work with people.
- We always have the questions about is there enough money? Heard many times that Canada took a systematic approach to destroy languages, and they need to take the same long-term approach to ensuring success.
- Hopefully commissioner will be able to help groups
- Always going to be difficult. Important thing is that we are willing to have the conversations. We are going to have to find a way to address it.